

Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession

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For CJ Richardson . . .

PREFACE

The words “Equal Justice Under Law,” carved into the western facade of the United States Supreme Court building, exemplify the nation’s commitment to principles of fairness and equality—principles that run deep within the American construct of justice.¹ For Americans, these principles have been “a rallying cry, a promise, an article of national faith,”² claiming its origins in the nation’s Declaration of Independence.³

In Hawai‘i, equality has been a mandate codified in the first law:

Kamehameha and Ka-hauku‘i paddled to Papa‘i and on to Kea‘au in Puna where some men and women were fishing, and a little child sat on the back of one of the men. Seeing them about to go away, Kamehameha leaped from his canoe intending to catch and kill the men, but they all escaped with the women except two men who stayed to protect the man with the child. During the struggle Kamehameha caught his foot in a crevice of the rock and was stuck fast; and the fishermen beat him over the head with a paddle. Had it not been that one of the men was hampered with the child and their ignorance that this was Kamehameha with whom they were struggling, Kamehameha would have been killed that day.

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¹ Supreme Court of the United States, *The Court Building*, <http://www.supremecourt.gov/about/courtbuilding.aspx> (last visited Sept. 26, 2010).

² Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 245 (1983).

³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . .”); see also Abraham Lincoln, President of the United States, Gettysburg Address, para. 1 (Nov. 19, 1863), available at http://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm (“Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal”); Barack H. Obama, President of the United States, 2009 Inaugural Speech (Jan. 20, 2009), available at <http://nytimes.com> (search “Obama inaugural address transcript”; then select “All Results Since 1851”; then follow “Transcript – Barack Obama’s Inaugural Address – Text”) (declaring that there is a promise “that all are equal, all are free, and all deserve a change to pursue their full measure of happiness”).

This quarrel was named Ka-lele-iki, and from the striking of Kamehameha's head with a paddle came the law of Mamala-hoe (Broken paddle) for Kamehameha.⁴

With the memory of a wooden paddle shattered across his face, Kamehameha, the first sovereign of the Hawaiian Islands, would forever internalize the responsibility he had to his people.⁵ In his royal edict, Ke Kānāwai Māmalahoe [Law of the Splintered Paddle],⁶ the first law of the Kingdom of Hawai'i, Kamehameha galvanized the supremacy of the law, protected people from physical harm, and enshrined equal rights for all.⁷

Centuries later, Kamehameha's vision of equality, like the words "Equal Justice Under Law," although admirably close, have failed to come to fruition in many aspects of life.⁸ Discrimination and exclusion have impeded the practice of law and have truly splintered the legal profession.⁹

I. INTRODUCTION

Adorned in a traditional lei hulu mamo (feather lei), an ancient Hawaiian symbol of nobility, Kathleen Sullivan successfully defended a Native Hawaiian school from challenges to its Hawaiian-only admissions policy.¹⁰ A former Dean of Stanford Law School, an honoree of the 100 Most Influential Lawyers in America, a veteran practitioner before the U.S. Supreme Court, a Marshall Scholar, and once considered a possible nominee to the Supreme Court,¹¹

⁴ SAMUEL H. KAMAKAU, RULING CHIEFS OF HAWAI'I 125-26 (rev. ed. 1992).

⁵ See CAROL CHANG, THE LAW OF THE SPLINTERED PADDLE: KĀNĀWAI MĀMALAHOE (Haw. Legal Auxiliary 1994), available at <http://www.hawaii.edu/uhelp/files/LawOfTheSplinteredPaddle.pdf>.

⁶ *Id.* at 16.

⁷ *Id.* at v, 16.

⁸ See generally ISLANDS IN CAPTIVITY: THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (Ward Churchill & Sharon H. Venne eds., South End Press 2004) (noting that Kamehameha's indigenous people, the Native Hawaiians, suffer the highest rates of serious illness, prison incarceration and homelessness, the lowest rates of higher education attainment, family income and limited self-governance over land, culture and politics in their own homeland).

⁹ See *infra* Parts II-III, discussing the history of exclusion in the legal profession, and the exclusion of minorities from the legal profession because of the bar examination.

¹⁰ Kamehameha Schools Communication Division, *Defenders of the Cause: Kamehameha's Legal Defense Team for Doe v. Kamehameha Schools includes Counsel with Local and National Expertise*, IMUA, at 30 (Mar. 2005), available at http://www.ksbe.edu/newsroom/imua/mar05/imua_mar05.pdf (noting that "Sullivan wore the lei hulu while defending Kamehameha's cause in court hearings on Nov. 4"); see also *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff'd*, 470 F.3d 827 (9th Cir. 2006) (en banc), *cert. dismissed*, 550 U.S. 931 (2007).

¹¹ Charlie Savage, *Wider World of Choices to Fill Souter's Vacancy*, N.Y. TIMES, May 1, 2009, at A1.

Sullivan has established herself as a preeminent legal scholar and advocate.¹² In a 2009 interview, Supreme Court Associate Justice Ruth Bader Ginsburg called Sullivan's *Constitutional Law*¹³ "one of the finest casebooks in all of law school"—memorializing the legal community's immense respect for this constitutional law expert.¹⁴

How then—given her exceptional credentials and curriculum vitae, matched only by an elite few—did this Harvard Law-trained scholar advocate fail the California bar examination in 2005?¹⁵ Where did she go wrong? Should the bar have denied Sullivan admission because of her score on one exam even though a justice of the Supreme Court relies heavily upon her work? What is the rationale for the bar examination? Is the bar examination an accurate arbiter for the profession? The larger question: Could justice be served, particularly for the marginalized, without the Kathleen Sullivans of the world?

The answers are not simple. Perhaps the bar examination is a "rite of passage" to the legal profession;¹⁶ perhaps it is the locked gate that is opened only for those with the "endurance to sit and concentrate for eight grueling hours";¹⁷ perhaps it is a way to weed out the potential "bad apples."¹⁸ Finally, as one law professor aptly noted, perhaps the bar examination continues to exist because "no one has advanced a persuasive substitute."¹⁹ Sullivan's minor failure, amid a legal career full of accolades and accomplishments, illuminates the splinters in the bar admissions system and the need for reform within the legal profession.

The bar examination has been an insurmountable barrier for many legally trained bar applicants for much, if not all, of its existence. It has "place[d] an indefensible premium on the applicant's ability to absorb and then disgorge a mass of factual data at a two- or three-day sitting."²⁰ There exist, however, more profound justifications for the bar examination's ultimate elimination.

¹² Stanford Law School, Kathleen M. Sullivan: Stanley Morrison Professor of Law and Former Dean, <http://www.law.stanford.edu/directory/profile/57/> (last visited Sept. 26, 2010).

¹³ KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (15th ed. 2004).

¹⁴ Interview by Brian Lamb with Ruth Bader Ginsburg, Associate Justice, U.S. Supreme Court, in Washington, D.C. (July 1, 2009), available at http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_Ginsburg.aspx.

¹⁵ James Bandler & Nathan Koppel, *Even Top Lawyers Fail California Exam*, WALL ST. J., Dec. 5, 2005, at A1 (noting that Kathleen Sullivan was among many to fail the California bar examination).

¹⁶ Interview with Nicole S. Pinaula, in Honolulu, Haw. (Feb. 16, 2010).

¹⁷ Interview with Ha'aheo M. Kaho'ohalahala, in Honolulu, Haw. (Feb. 9, 2010).

¹⁸ Interview with Randy J. Compton, in Honolulu, Haw. (Feb. 10, 2010).

¹⁹ STEPHEN GILLERS, *REGULATION OF LAWYERS* 552 (7th ed. 2005).

²⁰ Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A. J. 1215, 1215 (1971).

The examination is, unfortunately, a recapitulation of centuries of overt exclusion and discrimination from the legal profession.²¹

In an attempt to heal the societal wounds of the bar examination, this comment proposes an alternative for bar admissions in the twenty-first century. Using the State of Hawai'i as a model for reform, this comment suggests that the use of a diploma privilege, combined with retooled legal pedagogical practices and mandatory continuing legal education courses and pro bono service, offers a persuasive substitute for the bar examination that will help mend our splintered profession. Part II of this comment unearths the origins and exclusionary history of bar admissions and unveils the fragmented foundation upon which this profession is built. Part III discusses the bar examination as an instrument of exclusion for minorities. Part IV analyzes the diploma privilege as a viable alternative to the bar examination. Part IV also examines a dormant commerce clause challenge to the diploma privilege in the Wisconsin case *Wiesmueller v. Kosobucki*²² and offers a constitutional argument that validates this privilege. Finally, Part V proposes steps to reform bar admissions and the legal profession in Hawai'i, with the goals of creating a more diverse bar and increasing community access to legal services.

This comment is in no way a condemnation of the legal profession or of those involved in the bar admissions process. It is the author's sincere hope that this piece serves as a call to action for the legal community and aspiring attorneys.

II. SPLINTERED: EXCLUSION IN THE LEGAL PROFESSION

In a society where written laws were unnecessary and an elite few ruled, Kamehameha's "Law of the Splintered Paddle" symbolized a dramatic effort to afford rights to the common individual.²³ Akin to the symbolism of Ke Kānāwai Māmalahoe, the United States and the legal profession have made efforts to address historical wrongs.²⁴

Principles of fairness and equality demand that individuals should not suffer discrimination based on immutable characteristics.²⁵ From *Brown v. Board of Education*²⁶ to the Lilly Ledbetter Fair Pay Act of 2009,²⁷ the United States has

²¹ See *infra* Parts II-III.

²² 667 F. Supp. 2d 1001 (W.D. Wis. 2009).

²³ See CHANG, *supra* note 5, at iii.

²⁴ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

²⁵ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (holding that discrimination based upon immutable characteristics violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility").

²⁶ 347 U.S. 483 (1954) (mandating the desegregation of public educational institutions).

taken admirable strides to address the exclusion of individuals from society and from better opportunities. The legal profession has also taken steps to eliminate historical exclusion.²⁸ The creation of diversity studies and panels, the use of affirmative action programs, and the advent of the Access to Justice movement have primed the modern legal professional for a unique and truly special career that is on the verge of eliminating discrimination.²⁹ This encouraging atmosphere, however, has not always existed. Steeped within our own profession's history—a history that every attorney has a stake in—are unfortunate instances of exclusion.

A. Unfortunate History of Exclusion

Former U.S. Secretary of Labor Willard Wirtz once described the legal profession as the “worst segregated group in the whole economy.”³⁰ Notions of paternalism and racism permeated American society in the nineteenth and twentieth centuries, resulting in the effective exclusion of women, racial minorities, and foreign citizens from the legal profession.³¹

In 1878, when Clara Shortridge Foltz attempted to join the bar, she faced instant criticism: “[A] woman can’t keep a secret, and for that reason if no other, I doubt if anybody will ever consult a woman lawyer.”³² In 1869, the Supreme Court of Illinois denied Myra Bradwell admission to the bar, reasoning that: “God designed the sexes to occupy different spheres of action,

²⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending the Civil Rights Act of 1964 to allow the statute of limitations to begin with each new discriminatory paycheck in the context of equal-pay litigation and not at the date that payment was agreed upon).

²⁸ See generally HAW. ACCESS TO JUSTICE COMM’N, HAWAII ACCESS TO JUSTICE COMMISSION ANNUAL REPORT 7 (2009) [hereinafter ANNUAL REPORT], http://www.hsba.org/resources/1/Access%20to%20Justice/ATJ_Annual%20Report%2008-09/1-16-10%20-%20annual%20report%202009_final1.pdf; see also Susan Essoyan, *Justice for All?*, HONOLULU STAR-BULLETIN, Apr. 20, 2008, available at <http://archives.starbulletin.com/2008/04/20/news/story01.html> (detailing the pressing need for more lawyers that serve low-income individuals); Susan Essoyan, *Family Needs Legal Help to Save Home*, HONOLULU STAR-BULLETIN, Apr. 20, 2008, available at <http://archives.starbulletin.com/2008/04/20/news/story02.html>; Simeon R. Acoba, *Pro Bono Celebration: The Access to Justice Commission*, HAW. B.J., Dec. 2008, at 4.

²⁹ See ANNUAL REPORT, *supra* note 28.

³⁰ GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* 24 (1983) (citations omitted).

³¹ See *infra* note 39.

³² Sandra Day O’Connor, *First Women: The Contribution of American Women to the Law*, 28 VAL. U. L. REV. xiii, xiii (1994) (citing Virginia Elwood-Akers, *Clara Shortridge Foltz, California’s First Woman Lawyer*, 28 PAC. HISTORIAN 23, 25 (1984)).

and that it belonged to men to make, apply and execute the laws."³³ The U.S. Supreme Court agreed, declaring: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."³⁴ Beneath these words existed a "romantic paternalism" that put women "not on a pedestal, but in a cage."³⁵ Women were effectively excluded from the legal profession.³⁶

In 1844, *The Daily Eastern Argus* criticized Macon Bolling Allen's application for admission to the bar: "[I]s the practice of law so much more respectable than hoeing potatoes that a lawyer can be disgraced by contact with a black man, and not a farmer?"³⁷ Prior to the Civil War, many states restricted the practice of law to white males. Upon passage of the Civil War amendments,³⁸ African Americans were allowed to practice law in federal courts.³⁹ State courts, however, would remain closed to African Americans.⁴⁰ In one instance, the Maryland Court of Appeals in 1877 held that the "14th Amendment has no application"⁴¹ to the state's statutory racial barrier to the practice of law. In another, more poignant instance, after an African American successfully passed the Florida bar examination in 1897, a bar examiner admitted, "Well, I can't forget he's a nigger and I'll be damned if I'll stay here to see him admitted."⁴²

Even after obtaining admissions into all courts, African American lawyers were barred not only from white firms, but they also suffered discrimination at the hands of the government.⁴³ During the Franklin D. Roosevelt Administration, one African American attorney, seeking a federal government

³³ *In re Bradwell*, 55 Ill. 535, 539 (1869).

³⁴ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

³⁵ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

³⁶ Clara Shortridge Foltz, an advocate for women's equality, would fight through the adversity to become the first female attorney in Californian history. Myra Bradwell would not succumb to the male-dominated judicial process; she too would become an attorney. See Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987-88).

³⁷ J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 93 (1993).

³⁸ U.S. CONST. amend. XIII-XV.

³⁹ See generally Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, in *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 913 (Steve Sheppard ed. 1999).

⁴⁰ *In re Taylor*, 48 Md. 28, 33 (1877).

⁴¹ *Id.*

⁴² See Finkelman, *supra* note 39, at 931.

⁴³ *Id.* at 928.

position, waited three hours while every white applicant was interviewed.⁴⁴ The interviewer eventually told the African American attorney that the position was reserved for whites only.⁴⁵ The African American attorney painfully confronted his arduous dilemma: "One is driven to hate either his color or his country."⁴⁶ Thus, although concerted efforts to update admissions standards did crack open the door to professional opportunity, "the great wall of ethnic exclusion . . . still cut through the legal profession."⁴⁷ African Americans were effectively excluded from the legal profession.⁴⁸

Troubled by "the influx of foreigners," prominent Connecticut lawyer Theron G. Strong articulated that the rising proportion of Jewish lawyers was "extraordinary and overwhelming—so much so as to make it appear that their numbers were likely to predominate."⁴⁹ With decades of discrimination against foreign citizens, Attorney William Rowe warned of the "great flood of foreign blood . . . sweeping into the bar."⁵⁰ Rowe asked: how are "we to preserve our Anglo-Saxon law of the land under such conditions?"⁵¹ In 1909, the American Bar Association responded and prohibited noncitizens, particularly immigrants from eastern and southern Europe, from practicing law. One bar member summarized the bar's actions: "It is a matter of patriotism, and a national and political question."⁵²

The growing anti-Jewish sentiment in the legal profession in the United States would be quickly overshadowed by the exclusion of Jewish individuals from the legal profession in Europe.⁵³ In Nazi Germany, officials passed laws that discriminated against and excluded Jewish individuals from the legal profession.⁵⁴ Without legal representation and political power, Jewish

⁴⁴ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWS AND SOCIAL CHANGE IN MODERN AMERICA* 188 (1976).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ SMITH, *supra* note 37, at 93-96 (noting that Macon Bolling Allen became the first African American lawyer and first African American appointed to a judicial post).

⁴⁹ Jerold J. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in *LAW IN AMERICAN HISTORY* 585 (Donald Fleming & Bernard Bailyn eds., 1971) (citing THERON G. STRONG, *LANDMARKS OF A LAWYER'S LIFETIME* 347 (1914)).

⁵⁰ *Id.* (citing William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 593, 602-03 (1917)).

⁵¹ William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 593, 603 (1917).

⁵² See Auerbach, *supra* note 49, at 585 (citing ABA Reports, 34 (1909), 743-44)).

⁵³ RONNIE S. LANDAU, *THE NAZI HOLOCAUST* 136 (2006) (noting that in September 1938 it "became impossible for any Jewish lawyer to practi[c]e his profession").

⁵⁴ *Id.*

individuals were excluded from decision-making.⁵⁵ In Europe, the hatred of Jewish individuals led to the atrocity and horrors of the Holocaust. Jewish individuals were effectively excluded from the legal profession.⁵⁶

B. Hawai'i's History of Exclusion

Hawai'i has not escaped litigation arising from the exclusion of individuals from the legal profession. The Hawaiian jurisdiction has its own significant history of exclusion from the bar dating back to when Hawai'i was a sovereign nation.

During the Kingdom of Hawai'i era, the issue of admission arose within the context of admitting a foreign resident to the bar. In 1883, the Supreme Court of Hawai'i excluded Clarence W. Ashford, an 1880 graduate of the University of Michigan, from the bar of the Kingdom of Hawai'i because Ashford was not a citizen of the kingdom, even though he had practiced law in Michigan for a year and was admitted to the California bar.⁵⁷ The law stated: "The Supreme Court shall have power to examine and admit as practitioners in the Courts of Record, such persons being *Hawaiian subjects* of good moral character, as said Court may find qualified for that purpose."⁵⁸ The Supreme Court noted that "[w]e are therefore obliged to hold that the petitioner not being a Hawaiian subject cannot be admitted to practice in this Court."⁵⁹ Foreign citizens were effectively excluded from the legal profession.

In 1971, Dennis Walker Potts sued the justices of the Supreme Court of Hawai'i for denying him admission to the bar because he did not meet the residency requirement.⁶⁰ The Supreme Court of Hawai'i had previously held that "[t]he fact that a lawyer is licensed to engage in the general practice of law in one state does not give him a vested right to freely exercise such license in other states."⁶¹ The United States District Court for the District of Hawai'i, however, ruled in favor of Potts, holding that "the preexamination residential requirements imposed . . . upon United States citizens applying for leave to take Hawaii's bar examination contravene the Equal Protection Clause of the Fourteenth Amendment, and are thus invalid."⁶²

⁵⁵ *Id.*

⁵⁶ *But see In re Griffiths*, 413 U.S. 717, 729 (1973) (holding unconstitutional the exclusion of noncitizens).

⁵⁷ *In re Ashford*, 4 Haw. 614, 616 (1883).

⁵⁸ *Id.* (citing Haw. Civil Code § 1,065) (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Potts v. Honorable Justices of Supreme Court*, 332 F. Supp. 1392, 1398 (D. Haw. 1971).

⁶¹ *In re Petition of Avery*, 44 Haw. 597, 598, 358 P.2d 709, 710 (1961) (citations omitted).

⁶² *Potts*, 332 F. Supp. at 1398.

The legal profession's history can be characterized as one of discrete and sometimes outright exclusion. Kamehameha's vision of equality has, thus far, eluded many in the legal profession. Excluding individuals from the bar based on their citizenship, residency status, race, ethnic identity, or gender was thought to be a thing of the past. An analysis of the subversive effects of the bar examination on minorities in the U.S. and Hawai'i illuminates the urgent need for reform.

III. SHARD OF INEQUALITY: ANALYZING THE BAR EXAMINATION AS A SUBVERSIVE INSTRUMENT OF EXCLUSION

Remnants of a history of exclusion, like the dispersed shards of wood from Kamehameha's broken paddle, remain in the legal profession. The shard of inequality in the legal profession—the bar examination—has continued to be an effective tool of exclusion.

The constructs of admission to the legal profession have been strictly tailored over time to control the quality of professionals.⁶³ What started as a broad mechanism of creating qualified professionals, however, has evolved into a system that emphasizes the memorization capability of a prospective lawyer. An analysis of the history and the effects of bar admissions in the United States offers a glimpse into the changing socio-political landscape of the legal profession. Dissecting the effects of race on bar examination performance in Hawai'i and the failed attempts of litigating these disparities across the United States illustrate the dire need for statewide reform.

A. History and Effects of the Bar Examination

During early American colonial history, local courts granted candidates bar admission after they completed an apprenticeship.⁶⁴ The length of an apprenticeship varied with jurisdiction, but tended to extend across long periods of time.⁶⁵ Following the American Revolution, states began to develop

⁶³ See generally ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 165-66 (1965); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 25 (1983); see also JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 281-83 (1950).

⁶⁴ NAT'L CONFERENCE OF BAR EXAM'RS, THE BAR EXAMINERS' HANDBOOK 15 (Stuart Duhl ed., 2d ed. 1980) (citing Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SUN. AM. L. 453 (2004)).

⁶⁵ *Id.* at 15 (noting that at one time bar admission in Massachusetts required an eleven-year apprenticeship).

their own specific requirements for admission, which ranged from apprenticeships to oral and written examinations.⁶⁶

A growing public sentiment against elitist lawyers, however, pressured the bar admission gates to open to any white man, eliminating a fiscal barrier to entrance.⁶⁷ By the Civil War era, examinations were commonplace, but these exams tended to be a mere formality.⁶⁸

Christopher Columbus Langdell brought about the advent of legal educational institutions in 1870 with the creation of a standardized curriculum, which included case methods and Socratic teaching.⁶⁹ Some argue that with the movement toward formalized curriculums came the rise of accreditation to regulate the quality of a legal education.⁷⁰ The accreditation gap is often cited as the origin of the standard written bar examination.⁷¹

The bar examination initially developed as a mechanism of exclusion: "Educational reform was an effective vehicle for the exclusion of ethnic minority-group members."⁷² The implementation of a bar examination, which eliminates the diploma privilege, in some instances was the product of outright racially discriminatory animus:

Once African Americans gained access to legal training, "they changed the rules, and announced that hereafter everybody would have to take the exam." John Wrighten believed that the new requirement was an attempt to "punish African Americans." The legislator who introduced the bill that established the new requirement announced that it was designed to "bar Negroes and some undesirable whites."⁷³

⁶⁶ *Id.*

⁶⁷ See CHROUST, *supra* note 63, at 171; see, e.g., IND. CONST. art. VII, § 21 (1915) (repealed Nov. 8, 1932) (authorizing that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice"); SUP. CT. OF OHIO RULES OF PRACTICE XVI, § 6 (1883) (noting that the applicant need only show a signed certificate from a practicing attorney stating the applicant had "regularly and attentively studied law"); Finkelman, *supra* note 39, at 930 (acknowledging a New Hampshire law that "any citizen over twenty-one was entitled to be admitted to practice").

⁶⁸ Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., Aug./Sept. 1978, at 48 (retelling the anecdote of an applicant that was tested while his examiner, Abraham Lincoln, bathed, and quoting that "[t]he whole proceeding was so unusual and queer, if not grotesque, that I was at a loss to determine whether I was really being examined at all").

⁶⁹ John H. Schlegel, *Langdell's Legacy or, the Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1520 (1984).

⁷⁰ Michael Bard & Barbara A. Bamford, *The Bar: Professional Association or Medieval Guild?*, 19 CATH. U. L. REV. 393, 397 n. 23 (1970) (noting that "[i]n 1921 the ABA . . . began the practice of 'approving' or 'accrediting' law schools").

⁷¹ See *id.*

⁷² See AUERBACH, *supra* note 44, at 108.

⁷³ R. Scott Baker, *Schooling and White Supremacy: The African American Struggle for*

Legal educational institutions created further obstacles for minority students, such as tuition increases. “Professional barriers were high[,] but not insurmountable for th[ose] young m[e]n who could afford to attend college and who excelled at Harvard, Yale, or Columbia Law School.”⁷⁴ Ironically, due to the structure of the system, “the[] exclusiveness [of these schools] increased in direct proportion to diminishing financial resources and prevailing definitions of ethnic inferiority.”⁷⁵

Many argue that the bar examination is not an accurate arbiter of success as a lawyer. Dean Oliver S. Rundell of the Wisconsin School of Law articulated:

A bar examination is framed without any specific relationship to the particular educational background of the individuals who take it. It must be comprehensive in character and must call largely for information respecting things everyone is supposed to know. It necessarily emphasizes memory at the expense of reasoning and this is true no matter how conscious an effort is made to avoid such an emphasis.⁷⁶

The late retired Supreme Court of Hawai‘i Chief Justice William S. Richardson believed that the bar examination was a mere formality and would have eliminated it altogether.⁷⁷ Richardson, having never taken the Hawai‘i bar,⁷⁸ asserted that “anyone who could meet and pass the challenges during three years at an accredited law school was more than equipped to practice law: ‘Let the consumers determine a lawyer’s success; let the marketplace be the final arbiter.’”⁷⁹

The bar examination may not, on its face, seem discriminatory, but the negative result—recreating a cycle of privilege and denying admission largely to those in populations that are in desperate need of representation—is devastating to a profession that prides itself on justice for all. The bar examination becomes a subversive instrument of exclusion.

Some scholars argue that minority performance on the bar examination “generates concern that the bar examination . . . may be infected with racial,

Educational Equality and Access in South Carolina, 1945-1970, in TOWARD THE MEETING OF THE WATERS: CURRENTS IN THE CIVIL RIGHTS MOVEMENT OF SOUTH CAROLINA DURING THE TWENTIETH CENTURY 300, 305 (Winfred B. Moore & Orville V. Burton eds., 2008).

⁷⁴ Jerold S. Auerbach, *Book Review*, 15 AM. J. LEGAL HIST. 334, 334 (1971).

⁷⁵ *Id.*

⁷⁶ Richard A. Stack, Jr., Commentary, *Admission Upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 125 (1974) (citing 18 B. EXAMINER 244 (1949)).

⁷⁷ CAROL S. DODD, *THE RICHARDSON YEARS: 1966-1982*, at 97-98 (1985) (citing Interview by Carol S. Dodd with William S. Richardson, Chief Justice, Haw. Sup. Ct., in Honolulu, Haw. (June 30, 1982)).

⁷⁸ *Id.* at 97 (noting that Richardson’s opponents were quick to remind others that he had never taken the bar).

⁷⁹ *Id.* at 98.

ethnic, cultural, gender, and/or economic bias unrelated to the competent practice of law.”⁸⁰ One study conducted in Pennsylvania noted the implicit and explicit discrimination that occurred in the administration of the bar examination.⁸¹ A glance at the first-time bar passage rate provides an illustrative example of the disparate impact the bar examination has on minority applicants: 91.9% for Caucasians, 80.7% for Asian Americans, 75.8% for Mexican Americans, 74.8% for Hispanics, 66.36% for Native Americans, and 61.4% for African Americans.⁸² A recent New York study provides similar strong patterns of racial disparity in the bar passage rate: 86.8% for Caucasians, 80.1% for Asian/Pacific Islanders, 69.6% for Hispanics, and 54% for African Americans.⁸³

Studies have evidenced that bar examinations disproportionately exclude people of color from the practice of law.⁸⁴ The results of the bar examination, to a certain extent, mirror the performance of minorities on the Law School Admissions Test (LSAT).⁸⁵ Standardized testing, however, has historically been an inaccurate indicator of success,⁸⁶ leading some to assert that “[b]ar

⁸⁰ Cecil J. Hunt II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 723 (1996); see also Maurice Emsellem, *Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination*, 61 N.Y. ST. B.J. 42 (1989).

⁸¹ Peter J. Liacouras et al., *The Report of the Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures - Racial Discrimination in Administration of the Pennsylvania Bar Examination*, 44 TULSA L.Q. 141 (1970-71) (concluding that (1) certain practices raised the “strongest presumption” that blacks “are indeed discriminated against under the procedures used” in Pennsylvania, (2) that certain “examination practices raise a serious presumption that a not insubstantial number of all candidates have been delayed or deprived of admission to the Bar through unequal or arbitrary and capricious actions,” and (3) that a “thorough review of the bar examination process raises grave doubts concerning the validity of the Pennsylvania bar examination”).

⁸² Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 27 (1998), available at <http://www.unc.edu/edp/pdf/NLBPS.pdf> (last visited Apr. 25, 2010).

⁸³ MICHAEL KANE ET AL., IMPACT OF THE INCREASE IN THE PASSING SCORE OF THE NEW YORK BAR EXAM (2007), <http://www.nybarexam.org/summary2.pdf>.

⁸⁴ See Society of American Law Teachers Statement on the Bar Exam, 52 J. LEGAL EDUC. 446, 449-51 (2002) [hereinafter SALT Statement]; Susan M. Case, *The Testing Column, Men and Women: Differences in Performance on the MBE*, B. EXAMINER 44 (2006).

⁸⁵ See, e.g., Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006); Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006); John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167 (2006).

⁸⁶ See SALT Statement, *supra* note 84, at 450; Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed*

admission examinations as now administered place an indefensible premium on the applicant's ability to absorb and then disgorge a mass of factual data at a two or three day sitting.⁸⁷

Proponents of the bar examination counter that it does a fair job in testing and assessing a candidate's competency to be a lawyer.⁸⁸ But is the bar examination an accurate indicator of success in the legal profession? Attempts to litigate this issue have all failed.

B. Bar Examination Challenges in the Courts

Over the years, many bar applicants have filed unsuccessful lawsuits attempting to unearth the hidden tragedies of the bar examination.⁸⁹ Many legal challenges have failed because courts have generally refused to use demographic statistics in the context of employment discrimination claims.⁹⁰

Most bar applicants have bought the assumption that the bar examination does an accurate job in measuring one's fitness to practice law. With no validation of the bar examination, however, it is almost impossible to determine the correlation between the test and job performance as a lawyer. At the core of many of the failed lawsuits have been attempts to use the test validation argument established in *Griggs v. Duke Power Co.*⁹¹ to assert a violation of equal protection under the Fourteenth Amendment.⁹² In *Griggs*, the U.S. Supreme Court ruled that Title VII prohibited the use of any testing process, regardless of intent or motive, which disproportionately excluded members of a protected minority, unless such tests were "demonstrably a reasonable measure of job performance."⁹³

In *Tyler v. Vickery*,⁹⁴ and subsequently in *Parrish v. Board of Commissioners of the Alabama State Bar*,⁹⁵ the Fifth Circuit Court of Appeals denied the plaintiffs' use of *Griggs*' Title VII test validation argument. Although the state bar examiners regulate who can and cannot become a lawyer (in some sense serving as an employer), the *Vickery* court held that the Title VII

Alternatives, 45 CASE W. RES. L. REV. 1191 (1995).

⁸⁷ Bell, *supra* note 20, at 1215.

⁸⁸ See, e.g., Suzanne Darrow-Kleinhaus, *A Response to the Society of American Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442 (2004).

⁸⁹ See Hunt, *supra* note 80.

⁹⁰ *Id.*

⁹¹ 401 U.S. 424 (1971).

⁹² See, e.g. *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975); *Parrish v. Bd. of Comm'rs of the Ala. State Bar*, 533 F.2d 942 (5th Cir. 1976).

⁹³ *Griggs*, 401 U.S. at 436.

⁹⁴ *Tyler*, 517 F.2d at 1096.

⁹⁵ *Parrish*, 533 F.2d at 949 (determining that the court will not require test validation per the rationale of the court in *Tyler*).

test validation argument did not apply to the state bar examiners because the scope of Title VII was expressly limited to employers, employment agencies, and labor unions.⁹⁶ The court in *Pettit v. Gingerich* also denied the application of a Title VII standard to resolve the plaintiffs' equal protection claim under the Fourteenth Amendment.⁹⁷

Professor Cecil Hunt, however, suggests that a "ray of hope" may still exist for judicial challenges to the bar examination.⁹⁸ For example, in 1989, a New York federal district court struck down a state department policy that relied exclusively on Scholastic Aptitude Test scores to determine merit scholarships as unconstitutional under the rational relation test on the basis of gender discrimination.⁹⁹ Also, in 1976, a Virginia court held that the board of bar examiners was an agent of the courts and were thus held to the same standards as "employers," specifically under Title VII.¹⁰⁰ The court, however, decided not to extend Title VII test validation standards to licensing examinations because of federalism concerns.¹⁰¹

Is the bar examination an accurate gatekeeper to the legal profession? No one knows. Courts have skirted around this central issue and have ruled that test validations are unnecessary for the legal profession.

C. Race and the Bar Examination in Hawai'i

Analyses of the bar examination's effect on racial exclusion in Hawai'i's legal profession have been sparse because Hawai'i, like many states, does not regularly collect or maintain data on the race, ethnicity, or gender of its bar examination candidates. This has led some to demand a "demographic

⁹⁶ *Tyler*, 517 F.2d at 1096 (citing 42 U.S.C. § 2000e).

⁹⁷ 427 F. Supp. 282, 293 (D. Md. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978).

⁹⁸ See Hunt, *supra* note 80, at 760.

⁹⁹ *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345, 364 (S.D.N.Y. 1989). The rational relation test is a level of scrutiny under the Fourteenth Amendment's equal protection clause, in which laws will be upheld if there is a legitimate government interest that is rationally related to the government's actions.

¹⁰⁰ *Woodard v. Va. Bd. of Bar Exam'rs*, 420 F. Supp. 211, 213 (E.D. Va. 1976) (noting that the "Board's statutory origin, its role in performing the sovereign function of licensing professions, and the statutory restrictions placed on its authority are the primary factors supporting the Court's conclusion that an agency relationship exists") (citations omitted), *aff'd*, 598 F.2d 1345 (4th Cir. 1979), *overruled on other grounds by* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).

¹⁰¹ *Id.* at 214 (holding that "[t]he Supreme Court has recognized 'that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions'" (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975))).

assessment” because “[f]ailing to pursue a demographic study is a refusal to acknowledge that race, racial difference, sex, sexual orientation, and economic background have been significant and decisive barriers to practice.”¹⁰²

Despite the lack of statistical information from the State, the William S. Richardson School of Law (WSRSL) keeps records of student undergraduate grade point averages (GPAs), LSAT scores, law school GPAs, bar passage, and ethnicity.¹⁰³ The data has not been systematically analyzed, but the law school monitors these statistics carefully in its effort to enhance the diversity of the bar.¹⁰⁴ WSRSL Associate Dean of Student Services Laurie Ariel Tochiki acknowledged the disparate impact that the bar examination, LSAT, and admissions process generally has had on individuals of Native Hawaiian, Filipino, Polynesian, and Micronesian descent.¹⁰⁵ WSRSL has taken strides to diversify its student body with the establishment of the Ulu Lehua Program.¹⁰⁶ The initiatives of the law school, however, do not reflect the realities of the bar.¹⁰⁷ Thus, it is not surprising that these minorities are in fact minorities in the legal profession.¹⁰⁸ The unfortunate reality is that a disparate impact exists. The exclusion of individuals from the legal profession through a standardized examination has had a significant impact on society.¹⁰⁹ The problem is not that a minority individual is failing the bar examination and will have to pay more to retest. The problem is, as one attorney and scholar aptly noted, that “[r]acial

¹⁰² Sonny M. Ganaden, *To Be Real: The Necessity of Demographic Information for the Hawaii Bar*, 13 HAW. B. J. 179, 187 (2009).

¹⁰³ E-mail from Laurie Ariel Tochiki, Assoc. Dean of Student Servs., William S. Richardson Sch. of Law, to author (Apr. 24, 2010, 13:34 HST) (on file with author).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See ERIC K. YAMAMOTO, UNIVERSITY OF HAWAII AT MĀNOA WILLIAM S. RICHARDSON SCHOOL OF LAW PRE-ADMISSIONS PROGRAM REVIEW COMMITTEE, FINAL REPORT OF PRE-ADMISSIONS PROGRAM REVIEW COMMITTEE (1998) (on file with author) (acknowledging that WSRSL has taken steps to mitigate the disparate impact of racial minorities in the bar. In 1974, WSRSL established the Pre-Admission Program, now called the Ulu Lehua Program. The Ulu Lehua Program reflects the law school’s commitment to diversity. Ulu Lehua scholars are selected for admission to WSRSL for varied reasons: “exceptional personal talents, particularly in providing service to Hawaii’s poor, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, and ethnic background.”).

¹⁰⁷ HAWAII BAR JOURNAL, MEDIA KIT 5 (2010), available at <http://www.hsba.org/resources/1/Benefits/2010%20HBJ%20Media%20Kit.pdf> (noting that Hawaiians or Part-Hawaiians make up 7.7% of the bar and all “[o]ther ethnicities” comprising approximately 18.4% compared to 35.5% Caucasians, 26.8% Japanese, and 11.6% Chinese).

¹⁰⁸ See Appendix A for the self-reported ethnicities of members of the Hawaii State Bar.

¹⁰⁹ See *supra* Part III.A, discussing the bar examination as an effective tool to exclude ethnic minorities from the legal profession.

exclusion in the practice of law amounts to racial exclusion from the system of law.”¹¹⁰

What can be done to heal these societal fissures? Is there a way to mend the pieces of our splintered legal profession? Are there successful alternatives to the bar examination that have been and can be implemented?

IV. MENDING THE PIECES: ADMISSION BY DIPLOMA PRIVILEGE

The inflicted wounds of the bar examination can be healed. Mending the pieces of our splintered profession lies with the diploma privilege. The diploma privilege is a nuanced system in which graduates of in-state law schools are admitted to the state bar association upon completion of a prescribed curriculum. Wisconsin has such a system, which places the burden of determining the competency of applicants not on bar examiners, but rather upon in-state educational institutions that have a prescribed curriculum. The Wisconsin Supreme Court and the state bar association regulate these institutions.¹¹¹ As discussed later in this comment, the success of the diploma privilege in the state of Wisconsin is rooted in the thought and compromise that have gone into establishing the system.

A. Diploma Privilege in Context

Essential to understanding the diploma privilege is a contextual analysis of the struggle between legal educators and practitioners. This struggle exists today and seeks to answer the question of who should set the standards and regulate the legal profession.

The diploma privilege traces its origin to Virginia in 1842, when the William and Mary College and the University of Virginia sought and obtained legislative authorization to allow their graduates admission to the bar without examination.¹¹² In 1855, Theodore Dwight arranged for law students to be admitted to practice in New York State after being examined by three lawyers.¹¹³ The diploma privilege would follow in 1859 to Albany Law School, then to Columbia University and New York University in 1860.¹¹⁴ With the privilege, law schools could attract more students.¹¹⁵ The leadership

¹¹⁰ VERNON E. JORDAN, JR. & LEE A. DANIELS, MAKE IT PLAIN: STANDING UP AND SPEAKING OUT 144 (2008).

¹¹¹ See *infra* Part IV.B.

¹¹² Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39 (1974-75).

¹¹³ STEVENS, *supra* note 63, at 26.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

of the New York bar was “not pleased with the diploma privilege, which it felt took control of entry into the profession away from practitioners and gave it to legal educators.”¹¹⁶

American Social Science Association president Lewis Delafield, a leading critic of the privilege, attacked the “prevalent notion among laymen, which is shared by many professional men and has found expression from certain judges, that the gates to the bar should be wide open, and easy admission allowed to all applicants.”¹¹⁷ Delafield exclaimed “that the ‘unworthy’ had to be ‘excluded’ and ‘rejected.’”¹¹⁸ In 1877, the American Social Science Association urged the creation of a national lawyer’s group.¹¹⁹ The American Bar Association (ABA) emerged from these discussions.¹²⁰

In the late nineteenth century, law schools started to look for methods to minimize competition for their institutions. Many developed the diploma privilege, “which gave legislative approval to individual law schools to determine the quality of student needed to pass the bar.”¹²¹ The ABA, however, wanted to regain control of its admissions process:

The ABA opposed the privilege from the time of its creation and sought to institute local bar examinations, controlled by practitioners, as a better way of improving standards. Although the privilege was abolished locally by some jurisdictions, little major action took place nationally, until 1892, when the ABA began an outright assault. The system declined more rapidly after the ABA attack. In 1917, the numerous California and Minnesota schools lost the privilege, although twenty-two schools in fifteen states still enjoyed its advantages.¹²²

The popularity of the diploma privilege would soon plummet with the growing influence of the bar associations.

B. Wisconsin’s Diploma Privilege

The state of Wisconsin is the last stronghold for the diploma privilege. Applied to both the public University of Wisconsin Law School (UWLS) and the private Marquette University Law School (MULS), Wisconsin has shown considerable deference to legal educational institutions within its territorial boundaries to determine who is qualified to practice law:

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 27.

¹¹⁸ *Id.* at 27 (citing Lewis L. Delafield, *The Conditions of Admissions to the Bar*, 7 PENN MONTHLY 960 (1876)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 98.

¹²² *Id.* at 98-99.

[W]e may properly presume that their diplomas evidence a sufficient degree of qualifications to entitle them to admission to the bar. That presumption arises from the fact that it is the business of these institutions to train candidates for the practice of the law and to that end they have learned faculties and maintain the standards requisite to merit the approval of the council of legal education and admission to the bar of the American Bar Association.¹²³

In 1971, Wisconsin reformed admissions to the bar by admitting students from in-state schools upon showing completion of a strictly prescribed curriculum.¹²⁴ Wisconsin Supreme Court Rule 40.03 (Rule 40.03) further delineated the competency requirements for the diploma privilege.¹²⁵ Rule

¹²³ *In re Admission of Certain Persons to the Bar*, 247 N.W. 877, 878 (Wis. 1933).

¹²⁴ WIS. STAT. § 256.28(1)(b) (1971).

¹²⁵ Legal competence requirement: Diploma privilege. An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) *Elective subject matter areas; 60-credit rule.*

Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.

(b) *Mandatory subject matter areas; 30-credit rule.*

Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

(c) *Law school certification of subject matter content of curricular offerings.*

Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of time devoted in each course to the subject matter of the areas of law specified in this rule.

WIS. SUP. CT. R. 40.03.

40.03 requires that any applicant that earns a law degree from an ABA-accredited law school “in this state” shall be eligible for admission to the bar upon showing: first, satisfactory completion of at least eighty-four credits of study; and second, satisfactory completion of mandatory and elective courses in specified subject matter areas.¹²⁶

Rule 40.03(2)(a) requires students to take any combination of sixty credit hours of classes chosen from thirty specified topics.¹²⁷ The rule also requires that thirty of those sixty credit hours be spent in certain mandatory classes.¹²⁸ The thirty-credit and sixty-credit rule has led one author to proclaim that “Wisconsin has the most restrictive diploma privilege statute ever written.”¹²⁹ The specified curriculum includes, theoretically, the courses necessary to become an effective lawyer in Wisconsin.

The mandated curriculum is only a small aspect of Wisconsin’s diploma privilege. The diploma privilege is premised on the success of the law schools in preparing their students for a career in law. Both UWLS and MULS have created innovative and progressive curricula that “prepare [students] for the modern world by forcing up-to-date concerns into the classroom.”¹³⁰ The University of Wisconsin’s “Law in Action” program, discussed *infra*, offers a modern interdisciplinary approach to the study of law. As proof of a strict curriculum, UWLS Professor Beverly Moran, who has graded the bar examination in Wisconsin, commented that “an essay that will pass for Wisconsin bar examination purposes would fail if submitted for a University of Wisconsin Law School course.”¹³¹ Given the highly structured curriculum and a commitment to education beyond the lecture hall, it is not surprising that both law schools have ranked within the top tier of law schools in the nation.¹³²

The success of the diploma privilege in Wisconsin is also derived, as Professor Moran argues, from the unique characteristics and relationships of the legal educational institutions, the government, and the bar association within the state.¹³³ Professor Moran asserts that the diploma privilege has worked in Wisconsin because of three characteristics: first, Wisconsin is a small state

¹²⁶ *Id.* See also Appendix B for comparative chart of courses.

¹²⁷ WIS. SUP. CT. R. 40.03 § (2)(a).

¹²⁸ *Id.* § (2)(b).

¹²⁹ Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 42 (1974).

¹³⁰ Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WIS. L. REV. 645, 655 (2000).

¹³¹ *Id.* at 650.

¹³² See *Schools of Law: The Top 100 Schools*, U.S. NEWS & WORLD REPORT, May 2010, at 74 (noting that UWLS is currently ranked 28th); see also *The Top Law Schools*, U.S. NEWS & WORLD REPORT, May 2009, at 75 (noting that MULS was ranked 87th in 2009).

¹³³ Moran, *supra* note 130, at 645.

with a small practicing bar; second, there are close relationships between the bar, the judiciary, the legislature, and the law schools within the state; and third, the public and the bar have great regard for the state's law schools.¹³⁴

Wisconsin's diploma privilege has been successful on many fronts. The diploma privilege has been instrumental in addressing the issue of diversity in the legal profession: "Wisconsin avoids the disparate impact on minority applicants that bar examinations have imposed for decades."¹³⁵ The diploma privilege's success in turning out qualified legal professionals is evidenced through the high bar passage percentage rate for Wisconsin law students when taking the bar examination in other jurisdictions.¹³⁶ For a couple of years, Wisconsin graduates out-performed applicants from other states on the California bar examination, which is considered one of the toughest in the country, and on the Illinois bar examination.¹³⁷

For all the good evident in the diploma privilege, however, some argue for its final demise. A recent challenge in federal court asserted that the Wisconsin diploma privilege is unconstitutional because it violates the dormant commerce clause by discriminating against out-of-state law schools.¹³⁸

C. Constitutional Challenge to the Diploma Privilege

In 2007, Wisconsin resident Christopher Wiesmueller challenged, pro se, the Wisconsin diploma privilege on grounds that the privilege and similar requirements for bar admission violated the U.S. Constitution's Commerce Clause.¹³⁹ He sued the Wisconsin Board of Bar Examiners and the Wisconsin Supreme Court. Wiesmueller asserted that he was not trying to eliminate the diploma privilege in Wisconsin but that he instead hoped that the state "wouldn't impose a bar exam on everybody."¹⁴⁰ He articulated: "A lot of people see this as an attack on the diploma privilege and that's not the way I view it. Frankly, it's an attack on the bar exam."¹⁴¹

¹³⁴ *Id.* at 655.

¹³⁵ *Id.* at 653; see also Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 931-36 (1997); Hunt, *supra* note 80, at 733-86; John Antonides, *Minorities and Bar Exam: Color Them Angry*, JURIS DR., Aug./Sept. 1978, at 56.

¹³⁶ Moran, *supra* note 130, at 650.

¹³⁷ *Id.*

¹³⁸ See *infra* Part IV.C.

¹³⁹ Trial Pleading, *Wiesmueller v. Kosobucki*, 2007 WL 6799812 (W.D. Wis. 2007) (No. 07 C 0211 S).

¹⁴⁰ Erica Perez, *Lawsuit Challenges Policy that Lets Some Grads Skip Bar Exam*, JOURNAL SENTINEL, July 12, 2009, available at <http://www.jsonline.com/news/education/50497957.html>.

¹⁴¹ Jack Zemlicka, *Attorney is Intent on Revisions to Bar Admission*, WIS. L.J., June 30, 2008, <http://www.wislawjournal.com/article.cfm/2008/06/30/Attorney-is-intent-on-revisions-to-bar-admission>.

Procedurally, the case was prolonged by appeals, motions to dismiss, and issues of mootness for class certification purposes. On June 28, 2007, United States District Judge John C. Shabaz dismissed the case for failure to state a claim upon which relief may be granted and denied class certification, finding that the issue had become moot because Wiesmueller had become a member of the Wisconsin bar.¹⁴² Wiesmueller appealed, and the Court of Appeals for the Seventh Circuit reversed.¹⁴³ On remand, United States District Judge Barbara B. Crabb ruled in favor of the plaintiffs, granting class certification because Corinne Wiesmueller, Christopher Wiesmueller's wife, and Heather Devan were now the plaintiffs, represented by Christopher Wiesmueller.¹⁴⁴ Judge Crabb certified the following class for injunctive relief:

All persons who (1) graduated or will graduate with a professional degree in law from any law school outside Wisconsin accredited by the American Bar Association; (2) apply to the Wisconsin Board of Bar examiners for a character and fitness evaluation to practice law in Wisconsin before their law school graduation or within thirty days of their graduation; and (3) have not yet been admitted to the Wisconsin bar.¹⁴⁵

Wiesmueller again appealed Judge Shabaz's decision on new grounds, challenging the dismissal for failure to state a claim.¹⁴⁶ The Seventh Circuit again reversed and remanded the case to the district court, holding that the plaintiffs had indeed stated a claim upon which relief may be granted and that the "plaintiffs were denied an opportunity to try to prove their case."¹⁴⁷ On October 30, 2009, Judge Crabb denied the plaintiffs' motion for summary judgment, holding that the class plaintiffs could not seek summary judgment on a claim not raised in the complaint, and that the motion for summary judgment was premature.¹⁴⁸ In a scathing rebuke of Attorney Wiesmueller, Judge Crabb wrote that "counsel's inexperience is apparent," and ultimately denied class certification due to ineffective counsel.¹⁴⁹ In March 2010, the case was settled for \$7,500.¹⁵⁰

¹⁴² Wiesmueller v. Kosubucki [sic], No. 07-C-211-S, 2007 WL 4882649 (W.D. Wis. June 28, 2007).

¹⁴³ Wiesmueller v. Kosobucki, 513 F.3d 784 (7th Cir. 2008).

¹⁴⁴ Wiesmueller v. Kosobucki, 251 F.R.D. 365, 367 (W.D. Wis. 2008).

¹⁴⁵ *Id.* at 368.

¹⁴⁶ Plaintiff-Appellants' Principal Brief & Short Appendix at 6, Wiesmueller v. Kosobucki, 571 F.3d 699 (7th Cir. 2009) (No. 08-2527), 2008 WL 3977134 at *6.

¹⁴⁷ Wiesmueller v. Kosobucki, 571 F.3d 699, 707 (7th Cir. 2009).

¹⁴⁸ Wiesmueller v. Kosobucki, 667 F. Supp. 2d 1001, 1003-04 (W.D. Wis. 2009).

¹⁴⁹ *Id.* at 1005.

¹⁵⁰ Bruce Vielmetti, *Marquette, UW Law Grads Retain Diploma Privilege in Wisconsin*, JOURNAL SENTINEL (Mar. 24, 2010), <http://www.jsonline.com/news/wisconsin/89040482.html> (noting that under the settlement agreement, the Wiesmuellers can "never again challenge the

Although the court did not make a decision on the merits of the case, the issues raised are worth detailed discussion because they provide insight into the constitutional validity of the diploma privilege system. As previously stated, at the heart of the case is a challenge to the constitutional validity of the diploma privilege under the dormant commerce clause. The first step toward ascertaining the constitutionality of Rule 40.03 is defining the dormant commerce clause.

1. Dormant commerce clause

The U.S. Constitution reserves to Congress the power to “regulate Commerce . . . among the several States.”¹⁵¹ Courts have interpreted the Commerce Clause for the past century and a half to also have a negative implication on the power of states to regulate commerce.¹⁵² The negative implication, commonly referred to as the dormant commerce clause, is “driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’”¹⁵³

Justice Felix Frankfurter explained the dormant commerce clause: “[T]he doctrine [is] that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority.”¹⁵⁴ The dormant or negative commerce clause, therefore, is a judicial construct giving the states power to regulate commerce unless the state action is preempted by federal action. There are, however, countervailing constitutional rationales to consider in a traditional dormant commerce clause analysis: “The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens chose for the common weal.”¹⁵⁵

bar admission policies, they can’t assist, be part of or support anyone else’s challenge”).

¹⁵¹ U.S. CONST. art. I, § 8, cl. 3.

¹⁵² *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337 (2008); *see also* *Cooley v. Bd. of Wardens*, 53 U.S. 299, 318-19 (1852); *cf.* *Gibbons v. Ogden*, 22 U.S. 1, 200-11 (1824) (Marshall, C.J.) (dictum).

¹⁵³ *Davis*, 553 U.S. at 337-338 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

¹⁵⁴ FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WHITE* 18 (Quadrangle Paperback 1964) (1937); *see also* Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

¹⁵⁵ *Davis*, 553 U.S. at 338 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)).

It is essential to note that should Congress legislate on the issue, the question becomes one of preemption.¹⁵⁶ In this situation, however, because Congress has not acted, the Wisconsin diploma privilege was challenged on grounds that it excessively burdens commerce among the states. The Court has, however, carved out particular exceptions to the traditional dormant commerce clause analysis.

2. Government function

One exception to the traditional dormant commerce clause analysis is the government function rationale. In the 2008 case *Department of Revenue of Kansas v. Davis*, the U.S. Supreme Court reiterated that “a government function is not susceptible to standard dormant commerce clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the [Commerce] Clause abhors.”¹⁵⁷

Admission to the legal profession is arguably a government function and thus falls outside the paradigm of traditional dormant commerce clause analysis. Courts have often found that the regulation of attorneys is traditionally a power of the states.¹⁵⁸ In *Goldfarb v. Virginia State Bar*, the Court found that “[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the court.’”¹⁵⁹ Moreover, the Wisconsin Supreme Court Rules (Wis. Sup. Ct. R.) state that a lawyer “is a representative of clients, an officer of the legal system and a public citizen having special responsibility to the quality of justice.”¹⁶⁰

3. Facial neutrality

Assuming, arguendo, that the court does not accept the government function argument, Wis. Sup. Ct. R. 40 would still survive a traditional dormant commerce clause analysis. Under a traditional analysis, the threshold question to ask is whether the state action—here, Wis. Sup. Ct. R. 40—is facially,

¹⁵⁶ See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981) (“If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) (articulating that Congress may confer “upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy”).

¹⁵⁷ *Davis*, 553 U.S. at 341.

¹⁵⁸ See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

¹⁵⁹ *Id.*

¹⁶⁰ WIS. SUP. CT. R. 20 preamble.

effectually, or purposefully discriminatory: "The threshold inquiry we must make in deciding whether the [regulation] violates the Commerce Clause is whether it 'is basically a protectionist measure, or if it can fairly be viewed as a law directed to legitimate local concerns with effects upon interstate commerce that are only incidental.'"¹⁶¹ This standard amounts to a two-tiered approach in which the rule is either facially discriminatory and thus per se illegal, or facially neutral and thus subject to a balancing test as set out in *Pike v. Bruce Church, Inc.*¹⁶² Under the *Pike* balancing test, absent a discriminatory purpose, a law will "be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits."¹⁶³

Wiesmueller argued that the diploma privilege is unconstitutional as applied against ABA-approved law school graduates from outside of the state of Wisconsin because the words "in this state" in Wis. Sup. Ct. R. 40 constitute facial discrimination.¹⁶⁴ The Seventh Circuit Court, however, has noted that "'no clear line' [exists] separating the category of state regulation that is virtually per se invalid and the category subject to the *Pike* test."¹⁶⁵

Using the Seventh Circuit's analysis in *Scariano v. Justices of the Supreme Court of Indiana*,¹⁶⁶ it can be argued that the diploma privilege is facially neutral and does not discriminate against out-of-state law school graduates. In *Scariano*, the Seventh Circuit upheld an Indiana rule that allowed residents to be admitted to the bar without examination.¹⁶⁷ The court held that the rule, which provided conditional admission for practicing attorneys upon submission of an affidavit of intent to practice law in Indiana, did not discriminate against out-of-state practitioners.¹⁶⁸ Under the Indiana rule, should the applicant participate in active practice for five years, he or she would be admitted to the bar.¹⁶⁹ The court held that "[t]he mere fact that nearly everyone—particularly state residents with a political voice—labors under the same yoke negates any claims of discrimination."¹⁷⁰

¹⁶¹ See *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 559 (7th Cir. 1995) (quoting *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994)).

¹⁶² 397 U.S. 137 (1970).

¹⁶³ *Id.* at 142.

¹⁶⁴ Principal Brief and Short Appendix of Plaintiff-Appellant at 11 n.2, *Wiesmueller v. Kosobucki*, No. 08-2527 (7th Cir. Aug. 13, 2008), 2008 WL 3977134 at *11.

¹⁶⁵ *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

¹⁶⁶ 38 F.3d 920 (7th Cir. 1994).

¹⁶⁷ *Id.* at 927.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 928.

Whether the privilege passes constitutional muster depends on the balancing analysis of the burdens on interstate commerce and the benefits to the state.¹⁷¹ The burden on commerce is minimal; the burden on out-of-state law school graduates is the same burden all candidates must face upon admission to the bar of a given jurisdiction—the bar examination.¹⁷²

The putative local benefits, however, are many. The main benefit of the diploma privilege is that it ensures that all legal professionals are competent in Wisconsin law. The purpose of state-controlled bar admission is to ensure competent professionals in a given jurisdiction. If state-specific content is not being tested on a bar examination, then states should not control the admissions process and should move toward a national admissions process. During oral arguments before the U.S. Court of Appeals for the Seventh Circuit in *Wiesmueller v. Kosobucki*, Judge Richard Posner questioned the validity of the amount of Wisconsin law that is taught at UWLS and MULS. Professor Gordon Smith, a former Wisconsin professor, noted however, that “[a]s a former Contracts professor at Wisconsin, I can attest that every section of Contracts uses so-called ‘Wisconsin Materials,’ which are heavy on Wisconsin law.”¹⁷³ Smith further noted that “faculty at Wisconsin have an unusually strong attachment to the home state’s law, even if that seems foreign to two judges who have spent their academic careers at the University of Chicago Law School.”¹⁷⁴ Thus, the bar examination is unnecessary in Wisconsin because the Wisconsin law schools test heavily on Wisconsin law, which gets to the heart of testing in a specific jurisdiction.

Another benefit is that local relationships can flourish with the diploma privilege. In an analogous case, *Goetz v. Harrison*, the Supreme Court of Montana in 1969 upheld its diploma privilege on the grounds that its law school is small and is the only one in the state.¹⁷⁵ The Montana Supreme Court also stated that it is further able to maintain a close relationship with the faculty, students, and curriculum.¹⁷⁶

¹⁷¹ *Id.*

¹⁷² See generally NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION ON LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2010 22 (2010), http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2010.pdf [hereinafter COMPREHENSIVE GUIDE].

¹⁷³ Ashby Jones, *Does Wisconsin’s ‘Diploma Privilege’ Violate the Constitution*, WALL ST. J. L. BLOG (Apr. 14, 2009, 7:17pm), <http://blogs.wsj.com/law/2009/04/14/does-wisconsins-diploma-privilege-violate-the-constitution/>.

¹⁷⁴ *Id.*

¹⁷⁵ 462 P.2d 891, 895 (Mont. 1969).

¹⁷⁶ *Id.* (acknowledging that “[t]he Chief Justice is well acquainted with the instructors, familiar with the type of instruction given at the school, and able to determine accurately that standards are maintained”).

Thus, the local benefits of the diploma privilege outweigh the burden on commerce, and the privilege clears constitutional challenge. The state of Wisconsin has many interests in protecting the diploma privilege. Arguments that the diploma privilege will create incompetency in the profession are unfounded and contradicted by the fact that Wisconsin's legal system has been effective even though most of its bar members have never taken the bar examination.¹⁷⁷

V. KE KĀNĀWAI MĀMALAHOE: A PERSUASIVE SUBSTITUTE FOR THE BAR EXAMINATION IN HAWAII

Kamehameha's splintered paddle would come to symbolize the lesson gleaned from his experience: "good leaders make laws that safeguard the right of the people to work and play in peace and harmony."¹⁷⁸ A twenty-first century *Ke Kānāwai Māmalahoe*, reflective of Kamehameha's vision of equality, is essential to address the deep-seated inequities in the legal profession.

This comment has challenged the pervasiveness of exclusion in the legal profession and endeavored to constructively analyze one suggested alternative. But for all the good that it can accomplish, simply adding the diploma privilege is not enough. Statewide reform of the legal profession is necessary to bring the profession into the twenty-first century. Reform of admissions to the legal profession, however, cannot be a plight fought just by a new contingent of law students and budding attorneys. All stakeholders, including the state judiciary, the bar association, and WSRSL, must engage in this reform.

Some may perceive this comment as a law student's selfish call for the elimination of the bar examination. That is far from this author's intent. Simply put, reform is necessary to diversify the bar and increase access to the courts.¹⁷⁹ An increase in the number of minorities in the legal profession would

¹⁷⁷ REPORT OF THE COMMISSION ON LEGAL EDUCATION OF THE STATE BAR OF WISCONSIN (June 1996), available at http://www.wisbar.org/AM/Template.cfm?Section=Research_and_Reports&Template=/CM/ContentDisplay.cfm&ContentID=32065 (noting that "[a]lthough the membership of the State Bar of Wisconsin includes graduates of many law schools, a majority graduate from either Marquette University Law School or the University of Wisconsin Law School, the only law schools in the state").

¹⁷⁸ CHANG, *supra* note 5, at 16.

¹⁷⁹ Ronald T.Y. Moon, Speech at the Hawaii State Bar Association's Young Lawyer's Division annual meeting, Hilton Hawaiian Village (Oct. 24, 2008) [hereinafter Moon Speech] ("[T]he value and commitment we place on diversity can and will affect the public's trust and confidence in our profession and in our justice system as a whole . . . I encourage each of you to take stock of the racial and ethnic—as well as gender—diversity within your own firms, explore cultural sensitivity training seminars and programs, and establish a diversity criteria for recruitment that will promote all of the benefits that come with diversity and cultural

lead to an “improvement in public perception of the bar and the judicial system, legal services for underrepresented groups would increase, and the bar in general would become a more public-minded body.”¹⁸⁰ Retired Chief Justice Ronald Moon of the Supreme Court of Hawai‘i also addressed the pressing need for a more diverse bar that is representative of all of the citizens of Hawai‘i.¹⁸¹ The suggested reform must, therefore, answer key questions: How do we diversify the bar, and how do we increase access to justice in Hawai‘i?

Using Hawai‘i as a model, the necessary reform begins with replacing the main impediment to a diverse bar association—the bar examination—with an inclusive system in which graduates of WSRSL, upon implementation of a prescribed curriculum, will be automatically admitted to the bar, with the caveat that graduates perform at least twenty hours of pro bono work per year to retain membership.

Professor Lorenzo A. Trujillo, like Professor Moran, points to three factors to determine the suitability of the diploma privilege for bar admission in a particular state: “[f]irst, the state should be small with a correspondingly small practicing bar; second, there should be a close relationship among the state’s bar judiciary, legislature, and law school; and third, both the public and the bar should hold the state’s law schools in high esteem.”¹⁸² Thus, integral to the success of a new system are the relationships that are constructed and cemented between the law school, the bar association, and the state supreme court. Each institution will have to amend policies or rules to effectuate the necessary changes. Hawai‘i—as a small state with a small bar, close relationships among the judiciary, legislature and law school, and a law school that has a high reputation within the legal and public communities—provides a suitable environment for the diploma privilege. The following portion of this article describes the steps that each institution must take.

sensitivity.”).

¹⁸⁰ Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 83 (2007).

¹⁸¹ See Moon Speech, *supra* note 179; see also Press Release, Supreme Court of Hawai‘i, *Supreme Court Establishes Commission to Increase Access to Justice* (May 1, 2008), available at http://www.courts.state.hi.us/news_and_reports/press_releases/2008/05/supreme_court_establishes_commission_to_increase_access_to_justice.html (quoting Justice Simeon R. Acoba, Jr.’s comment that “Chief Justice Moon has been a prime mover in the Judiciary’s efforts to afford equal access to the courts to those who, up until now, have faced barriers that have been insurmountable”) (internal quotation marks omitted).

¹⁸² Trujillo, *supra* note 180, at 96-97.

A. Legal Education Reform: Restructuring Curriculum

Chief Justice William S. Richardson envisioned the expansion of educational and professional opportunities¹⁸³ for Hawai'i students and advocated for the creation of a state law school.¹⁸⁴ His dream would be realized with the founding of the University of Hawai'i at Mānoa Law School—later named after him—the premiere legal educational institution in the fiftieth state. The purpose of the school was to provide a quality legal education for the citizens of Hawai'i. As one legislator aptly noted, "Hawaii's reservoir of talent will therefore be employed to the pressing problems of our changing technological society by the establishment of a law school."¹⁸⁵ A legislative committee concurred that "the establishment of a full three-year law school will fill a pressing need to provide expanded opportunities for Hawaii's students to acquire education and training in law."¹⁸⁶

Inherent in its inception was the notion that Hawai'i needed a law school to serve the needs of its unique and diverse community. The legislature sought "the development of a law program curriculum that takes into account the University's existing academic strengths and the *special needs of Hawaii*."¹⁸⁷ Given the truly unique and special qualities inherent to the only law school in the state, WSRSL could benefit from a structured reform of legal pedagogy.

1. Law in action

Students must learn to read carefully. They must distinguish cases and construe statutes. They must fashion a legal argument and respond to one. They must

¹⁸³ DODD, *supra* note 77, at 97 (noting that Chief Justice Richardson's reformation of the bar admissions process led to an increase in the bar passage rate from an average of 51% before his tenure to 91% by 1978).

¹⁸⁴ *Id.* (quoting Richardson: "We watched in frustration as our lands were lost to us under laws which were completely foreign to the ancient Hawaiian concepts of land ownership, and we saw our people made liable for 'crimes' that did not exist under the old Hawaiian system. I know that some of you may disagree with me, but I believe we must accept the fact that we live under a system of laws and courts, which have replaced the traditional ways of our ancestors, and, in order to preserve our people, culture, and land, we must take an active role in the system. The law can be used by creative attorneys as a sword for advancing the rights of our Hawaiian people.").

¹⁸⁵ Haw. Stand. Comm. Rep. No. 694, 6th Leg., Reg. Sess., in 1971 House Journal, at 524 (1971) (Statement of Rep. Robert Kimura).

¹⁸⁶ Haw. Stand. Comm. Rep. No. 797, 6th Leg., Reg. Sess., in 1971 Senate Journal, at 1145 (report of the Senate Ways and Means Comm.).

¹⁸⁷ *Id.* (emphasis added).

draft a complaint. But this is not enough. The challenge is to prepare students to deal with the law in action during their legal careers.¹⁸⁸

Wisconsin's signature *Law in Action* approach to legal education provides that "in order to truly understand the law, you need not only to know the 'law on the books,' but also to look beyond the statutes and cases and study how the law plays out in practice."¹⁸⁹ Thus, the core of the program answers the larger question: "Why should this matter to people in the real world?"¹⁹⁰ A Wisconsin professor notes that the legal curriculum should "represent[] the dominant ideas of law as process (providing legitimated means for the emergence of public policy decisions and their adaptation to experience) and as function (providing, or legitimating other provision, for the operational needs of society and of individual life)."¹⁹¹ Reforming legal pedagogy requires shifting the notion of law as static to one in which law becomes "processes of shaping social order—by defining and measuring law's roles in society by the social functions to which it contributes and in which it participates."¹⁹²

The *Law in Action* program necessitates a faculty devoted to service to the state and the nation. The law professor "can better keep in touch, and at the same time be of the most help to society, through activity in the fields of research or service."¹⁹³ Engaging a faculty dedicated to the betterment of society, as opposed to mere regurgitation of appellate decisions, provides one critical step to reforming the law school. With national and international scholars and advocates ushering law students through their education, WSRSL has the foundation to set this program in motion.¹⁹⁴ WSRSL students are engaged and encouraged to answer the questions: What is really going on? What are the social, political, and economic implications of laws and policies?

Modeled after Wisconsin Law School, the *Law in Action* program would best serve the needs of Hawai'i's community.

¹⁸⁸ Stewart Macaulay, *Wisconsin's Legal Tradition*, 24 GARGOYLE 6, 9 (1994), available at http://law.wisc.edu/facstaff/macaulay/papers/wisconsin_legal_tradition.pdf.

¹⁸⁹ Kenneth B. Davis, Jr., *Law in Action: The Dean's View*, 30 GARGOYLE 2, 2 (2004), available at http://law.wisc.edu/alumni/gargoyle/archive/30_1/gargoyle_30_1_1.pdf.

¹⁹⁰ *Id.* at 4.

¹⁹¹ Willard Hurst, *Changing Responsibilities of the Law School: 1868-1968*, 1968 WIS. L. REV. 336, 337 (1968).

¹⁹² *Id.* at 344.

¹⁹³ John E. Conway, *The Law School: Service to the State and Nation*, 1968 WIS. L. REV. 345, 345 (1968).

¹⁹⁴ See UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, CATALOG 13-15 (2010), <http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/webFM/2010CatalogwithInserts.pdf> (noting the many accomplishments of the WSRSL deans and faculty).

2. Changes to the WSRSL curriculum

The thirty- and sixty-credit rule in Wis. Sup. Ct. R. 40.03 mandates specific core and elective courses, respectively, that must be taken to fulfill the credit requirement. The present WSRSL curriculum almost mirrors the thirty-credit curriculum mandated under Wis. Sup. Ct. R. 40.03.¹⁹⁵ (See Appendix B for a comparison chart of the required courses in each of the legal educational institutions.) It should be further noted that according to a 2010 self-study, many WSRSL students chose to enroll in the upper division courses that are tested on the bar examination.¹⁹⁶ Law school, for most students at WSRSL, becomes a large bar preparation course, thus bolstering the argument for a curriculum that reflects what is tested on the bar examination.

Courses that WSRSL should require upon implementation of a diploma privilege include: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Legal Writing and Research, Real Property, Torts, Evidence, Professional Responsibility, Trusts and Estates, an Advanced Legal Research course, and a clinical course. Aside from these required courses, students would select electives from the list as specified in Wis. Sup. Ct. R. 40.03, leaving the current courses taught at WSRSL intact.

Some of the policies instituted at WSRSL would remain. For example, the mandated sixty hours of pro bono service during a student's education and the clinical requirement provide students opportunities to gain real world experience.¹⁹⁷ The use of interdisciplinary coursework, practicum, and pro bono service provides benefits to all—professors can expand their syllabi, students can have structured and thought-provoking dialogue, and the community benefits from having well-rounded scholar advocates. Should WSRSL incorporate this reform, there would be an easier road to amending Hawai'i Supreme Court rules and enlisting the support of the bar association.

¹⁹⁵ Compare UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, STUDENT HANDBOOK 6 (2010-11), <http://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/StudentHandbookJuly182008.pdf> (noting that the current curriculum of the WSRSL requires Civil Procedure (6 credits), Contracts (6 credits), Criminal Justice (4 credits), Legal Practice (6 credits), Real Property (4 credits), Torts (4 credits), Constitutional Law I (3 credits), Professional Responsibility (3 credits), Second Year Seminar (4 credits), and a Clinical Experience (at least 2 credits)) with Wis. Sup. Ct. R. 40.03 (2010).

¹⁹⁶ UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, 2010 SELF-STUDY 31-34 (2010) (on file with author).

¹⁹⁷ UNIV. OF HAW. AT MĀNOA WILLIAM S. RICHARDSON SCH. OF LAW, STUDENT HANDBOOK 80 (2010-11), available at <http://www.law.hawaii.edu/StudentHandbook>.

B. Court Reform: Amending Supreme Court Rules and Providing Accountability

The next and ultimately most important steps toward reformation lie under the sole purview of the Supreme Court of Hawai‘i. The Hawai‘i Constitution mandates that “the [s]upreme [c]ourt shall have power to promulgate rules and regulations in all civil and criminal cases for all courts related to process, practice, procedure, and appeals, which shall have the force and effect of law.”¹⁹⁸ Furthermore, the Supreme Court of Hawai‘i has held that “the power to regulate the admission . . . of attorneys is judicial in nature and is inherent in the courts.”¹⁹⁹

As the sole regulator of bar admissions, the Hawai‘i Supreme Court has the discretion to implement new rules and procedures for admittance. The court should supplement Hawai‘i Supreme Court Rule 1 (Haw. Sup. Ct. R. 1) (Bar Admissions) language with language identical to Wis. Sup. Ct. R. 40 to allow graduates of law schools within the state to be admitted to the Hawai‘i bar upon showing completion of the prescribed curriculum and satisfactory completion of pro bono service. To effectuate this recommendation, a judicial commission should be established to evaluate the use of a diploma privilege in Hawai‘i and to begin a discussion of a uniquely Hawaiian curriculum.²⁰⁰

The notion of treating a group of individuals with certain privileges to practice in the bar is not uncommon in Hawai‘i. The court has granted and continues to grant certain privileges to different groups of individuals. Haw. Sup. Ct. R. 1.8, for example, allows faculty members of WSRSL to be admitted to practice in Hawai‘i upon proof that they are admitted in another jurisdiction.²⁰¹ Theoretically, a UWLS graduate (with a diploma privilege) could move to Hawai‘i and become a Professor of Law at WSRSL, thus

¹⁹⁸ HAW. CONST. art. VI, § 7.

¹⁹⁹ *In re W.D.P.*, 104 Haw. 435, 438, 91 P.3d 1078, 1081 (2004) (citing *In re Trask*, 46 Haw. 404, 415, 380 P.2d 751, 758 (1963)); *see also* *Ginger v. Circuit Court for County of Wayne*, 372 F.2d 621, 625 (6th Cir. 1967) (noting that state supreme courts “have exclusive jurisdiction over the admission of attorneys”); *In re Vanderperren*, 661 N.W.2d 27, 29 (Wis. 2003) (holding that “[t]he duty to examine applicants’ qualifications for bar admission rests initially on the Board, and this court relies heavily on the Board’s investigation and evaluation; however, this court retains supervisory authority and has the ultimate responsibility for regulating admission to the . . . bar.”) (citation omitted); *In re Krule*, 741 N.E. 2d 259, 260 (Ill. 2000) (articulating that “the final judgment regarding admission of an applicant to the practice of law rests with this court”).

²⁰⁰ Wisconsin implemented its diploma privilege through legislative action. Given the particularly special relationships that need to be fostered, it would be essential for the State Judiciary to take it upon itself to promulgate a rule to effectuate this reform.

²⁰¹ HAW. SUP. CT. R. 1.8.

garnering admission to practice in Hawai'i, having never taken a bar exam.²⁰² This exception to the general rule that all applicants must take a bar examination further justifies the use of a diploma privilege in the State.

The Hawai'i Supreme Court Rules should also be amended to mandate twenty hours of pro bono service per year for all WSRS� graduates to maintain bar membership. This offers several advantages: first, the bar association and the judiciary would have an incentive to provide for the diploma privilege; second, this rule would consequently increase access to justice, considering the large cohort of lawyers entering the profession; and third, lawyers in Hawai'i will have a direct connection with the community and those individuals who are in dire need of legal support. Some who may question the validity of such a policy need look only to the Supreme Court's determination on such issues. For example, in *Schwabe v. Board of Bar Examiners*, the U.S. Supreme Court held that while "[a] State can require high standards of qualification, such as good moral character or proficiency in its law . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law."²⁰³

The Supreme Court of Hawai'i has taken ardent strides to implement programs and reforms to increase access to justice.²⁰⁴ Through the implementation of bar admission reform, the Supreme Court can make good on its commitment to increase diversity within the bar and expand access to justice.²⁰⁵

C. Bar Reform: Mandating Continuing Legal Education

A goal of the Hawai'i State Bar Association (HSBA) is to "eliminate unfair bias, prejudice and discrimination and to create *meaningful* opportunities for underrepresented groups in the legal system."²⁰⁶ The educational attainment gap for minority students has been duly noted; therefore, bar admission reform would be one meaningful way to afford these underrepresented groups a voice in the system.²⁰⁷

Implementing a diploma privilege necessitates cooperation and interaction between all affected institutions. The HSBA will become more visible during the process of setting a curriculum for students in collaboration with the Hawai'i Supreme Court and WSRS�. Members of the HSBA will also have a shared commitment and connection to service within the island community. In

²⁰² See *id.*

²⁰³ 353 U.S. 233, 239 (1957).

²⁰⁴ See ANNUAL REPORT, *supra* note 28.

²⁰⁵ *Id.*

²⁰⁶ Haw. State Bar Ass'n, Hawai'i State Bar Association, http://www.hsba.org/HSBA_Mission.aspx (last visited Apr. 25, 2010) (emphasis added).

²⁰⁷ STEVENS, *supra* note 63, at 25.

establishing committees and task forces, and advocating for this diploma privilege reform, the bar association can take the lead to ensure the best lawyers.

The proposed reform involves not just ensuring an initially qualified bar, but also demanding the highest professional competency and performance. One of the steps that the bar can take to raise the caliber of all practicing attorneys after admission is to require more credit hours of continuing legal education. The current abysmal three-credit hour requirement is one of the lowest in the nation.²⁰⁸ Requiring more CLE courses will update attorneys on changes in the law and will raise the quality of the bar, theoretically ensuring competent lawyers.

The HSBA can further help in reforms by encouraging members and member firms to assess, critique, and reform their hiring and promotion practices. As retired Chief Justice Moon asserted, the bar must take steps to diversify its hallways by setting hiring criteria that increases racial and socioeconomic diversity within the profession.²⁰⁹

D. Practical Concerns

As with any movement for reform, practical concerns must be taken into consideration. This section discusses the probable concerns of such reform as well as proposed responses.

Who determines admissions? The major concern with this reform is determining who will be the arbiter of bar admissions. Under this reform, the law school would be the institutional gatekeeper to determine competence, and the Supreme Court would still have the function of determining character and fitness.

Will Hawai'i law school graduates have the option to take the bar examination instead of participating in the new curriculum? No. Under this reform, all Hawai'i law school graduates need to participate and bear the same burden to ensure their commitment to the bar and the judiciary. In exchange for the elimination of the bar examination, law students would be required to take the prescribed curriculum and perform twenty hours of pro bono service per year (which WSRSL already mandates for students). Thus, the courts and the bar association would have to work more closely with the law school to set a curriculum and ensure that everyone follows through on their commitments.

What will happen to the specialized fields that make WSRSL unique, such as the Environmental Law and Native Hawaiian Law Programs? The specialized

²⁰⁸ See COMPREHENSIVE GUIDE, *supra* note 172, at 39-40 (noting that most other states require more than ten hours of continuing legal education courses).

²⁰⁹ See Moon Speech, *supra* note 179.

programs at WSRSL would be kept intact. Individuals would have numerous electives to choose from, some of which could be credited toward a certificate in a specialized field.

Who benefits from the bar examination? Bar preparation businesses benefit from the money that bar applicants pay for prep courses. Many suits have alleged that these bar courses have created a monopoly in violation of the Sherman Antitrust Law.²¹⁰ For example, in *Rodriguez v. West Publishing Corp.*, the disputing parties reached a settlement, with \$49 million dollars placed in a fund for the class action plaintiffs.²¹¹

What are the benefits of reform? The judiciary would save money by not having to administer the bar examination for a large number of students. The reform would raise the standards and quality of the HSBA, raise the quality of legal education in Hawai'i, and create closer relationships among other legal institutions in the state. The reform would allow law students to practice upon graduation and save graduates stress and money. The reform, more importantly, would eliminate the bar examination and the barrier that it has become for many minority students, thus effectively opening the profession to more underrepresented communities and groups.

VI. CONCLUSION

The time is ripe to mend the splintered pieces of the legal profession and paddle forward as a unified community in Hawai'i. The antiquated use of the bar examination has been an unnecessary regulatory roadblock for many qualified individuals. The use of the diploma privilege, combined with mandatory continuing legal education courses and pro bono services provide, a persuasive substitute to the monotony that is the bar examination.

Mending these pieces of the profession will not, in and of itself, eliminate exclusion from the profession, but it will be a large step toward a new beginning. Of all professions, the legal profession should not be one of exclusion. Only with vigilant adhesion to sincere principles of equality and acceptance, and continued collaboration between the bar, the courts, and the community at large, will the legal profession flourish as a bastion of liberty and justice for all.

E lauhoe mai nā wa'a; i ke kā, i ka hoe; i ka hoe, i ke kā; pae aku i ka 'āina.²¹²

²¹⁰ See, e.g., *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009).

²¹¹ *Id.* at 957.

²¹² MARY KAWENA PUKU'I, 'ŌLELO NO'EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 40 (1993).

Everyone paddle the canoes together, bail and paddle; paddle and bail; and the shore is reached.²¹³

²¹³ *Id.*

Appendix A: HSBA Members' Ethnicities

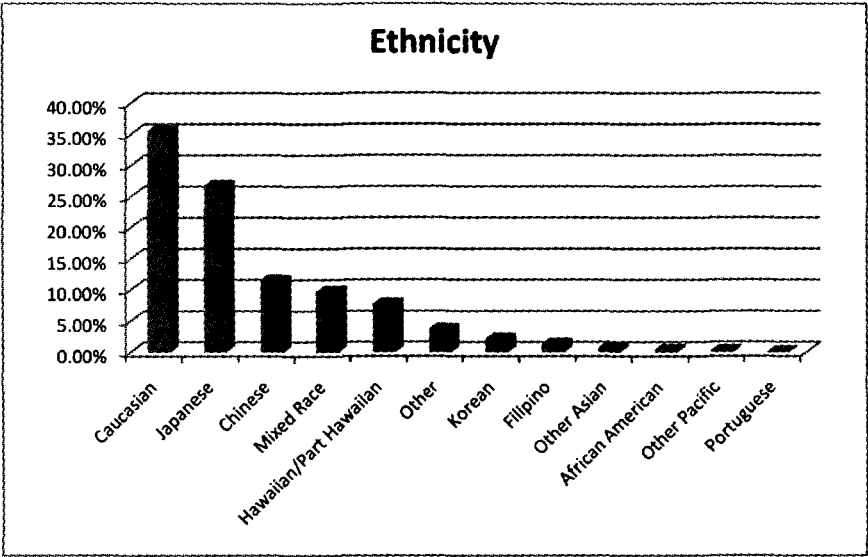
The following worksheet synthesizes the HSBA statistics of ethnicities among bar members in 2010. The worksheet numerically demonstrates the underrepresentation of certain ethnic groups within the HSBA.

	Afro American		Caucasian		Chinese		Filipino		Hawaiian, Part Haw'n		Other Pacific Islander		Korean		Japanese		No Answer		Others		Total		Total
	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Members
Active	5	13	374	944	116	227	37	52	71	104	6	9	32	65	228	464	167	365	92	179	1,128	2,422	3,550
Active - Emeritus			8	60	1	19	1	2	1	8				1		25	1	12		4	12	131	143
Government		5	100	141	42	44	15	20	47	30		1	8	13	105	104	80	54	36	35	433	447	880
Government Emeritus				3				2						1		1		1			0	8	8
Judge			7	22	2	4		6	1	6		3		2	7	10	7	7	2		26	60	86
Judge Emeritus				1						1											0	2	2
Inactive Emeritus			15	72		13	1	1		7			1	3		40	4	15		7	21	158	179
Inactive Voluntary	8	9	418	664	106	74	33	18	85	55	12	15	31	19	159	159	162	250	79	69	1,093	1,332	2,425
Inactive Pro Bono				2		1															1	2	3
Total	13	27	922	1,909	268	381	87	101	205	211	18	28	72	104	499	803	421	704	209	294	2,714	4,562	7,276

	Afro American	Caucasian	Chinese	Filipino	Hawaiian, Part Haw'n	Other Pacific Islander	Korean	Japanese	No Answer	Others	Total
Active	18	1,386	363	92	184	15	98	717	545	275	3,693
Government	5	244	86	37	77	1	22	210	135	71	888
Judge		30	6	6	8	3	2	17	14	2	88
Inactive	17	1,171	194	53	147	27	54	358	431	155	2,607
Total	40	2,831	649	188	416	46	176	1,302	1,125	503	7,276

HAW. STATE BAR ASS'N, 2010 BAR STATISTICS 4 (2010), *available at* <http://www.hsba.org/resources/1/About%20HSBA/2010%20Statistics.pdf>. This worksheet is reproduced with permission from Lyn Flanigan, Executive Director of the HSBA.

The following graph is a visual representation of the self-reported ethnicities of HSBA members in 2008. The graph shows the ethnicities of members along the horizontal axis and the percentage of those specific ethnic groups in the HSBA along the vertical axis.



HAW. STATE BAR ASS'N, 2008 HSBA MEMBER SURVEY 24 (2008), *available at* <http://www.hsba.org/resources/1/Survey%20Results/2008%20HSBA%20Member%20Survey%20-%20Report%20NO%20COMMENTS.pdf>. This graph is reproduced with permission from Lyn Flanigan, Executive Director of the HSBA.

Appendix B: Course Requirements

The following chart is a comparison of the required courses at the William S. Richardson School of Law (WSRSL), the University of Wisconsin Law School (UWLS), and Marquette University Law School (MULS). The strict curriculum of UWLS and MULS is regulated by the state judiciary, the state bar association, and the state legal institutions to ensure that Wisconsin law is being taught.

WSRSL Required (2010)	UWLS Required (2012)	MULS Required (2010)
Civil Procedure	Civil Procedure I	Civil Procedure
Constitutional Law		Constitutional Law
Contracts	Contracts I	Contracts
Criminal Law	Criminal Law	Criminal Law
Legal Practice	Legal Research & Writing	Legal Writing & Research
Property	Property	Property
Torts	Torts	Torts
		Evidence
Professional Responsibility		Law and Ethics of Lawyering
		Trusts & Estates
		Perspective Elective*
		Process Elective**
		Public Law Elective***
Second Year Seminar		Advanced Legal Research
Clinical Experience		Workshop
		Seminar
	Criminal Procedure	
60 Pro Bono Hours		
	One elective chosen from: Civil Procedure II, Constitutional Law I, Contracts II, or Legal Process	* Perspectives courses include American Constitutional History, American Legal History, Comparative Law, Comparative Transitional Justice, Federal Indian Law, The Global Workplace, Law and Popular Culture, Jurisprudence, Law & Economics, Law & Religion, Law & the Social Sciences: Parent, Child & State, Military Law, and Quantitative Methods. Not all courses are offered every year.
	60 more credit hours chosen from courses specified by the Registrar in a particular year.	** Process elective courses include Administrative Law, Advanced Civil Procedure, Alternative Dispute Resolution, Criminal Process, Family Law and ADR, and Legislation. Not all

		courses are offered every year.
		*** Public Law electives include The Constitution & Criminal Investigations, Constitutional Law 2: Speech & Equality, Education Law, Federal Courts, Law of Privacy and Local Government Law. Not all courses are offered every year.